UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

JULIO CÉSAR DE LA ROSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 09-1217 (JAF)

(Criminal No. 05-309)

OPINION AND ORDER

Petitioner brings this pro-se petition under 28 U.S.C. § 2255 for relief from sentencing by a federal court, alleging that the sentence was imposed in violation of his rights under federal law. (Docket Nos. 1; 5.) The Government opposes (Docket No. 11), and Petitioner responds, requesting an evidentiary hearing and the appointment of counsel (Docket No. 12).

I.

Factual and Procedural History

Petitioner was a crew member of the Sea Atlantic, a Bolivian commercial vessel that was intercepted by the U.S. Coast Guard in August 2005 while smuggling over 1,800 kilograms of cocaine. Coast Guard servicemen stopped the Sea Atlantic when their monitoring of radio and radar signals revealed that the vessel had a suspicious rendezvous with a much smaller and faster boat. Under the auspices of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. app. § 1903 (current version at 46 U.S.C. §§ 70501–70507), Coast Guard officers obtained permission from Bolivia to board the Sea Atlantic. After a search, sixty-eight bales of cocaine were discovered in a secret compartment in Petitioner's sleeping quarters. Petitioner,

along with the rest of the crew, was detained on the Sea Atlantic for nine days as it sailed to Puerto Rico.

Petitioner was indicted on counts of conspiracy to possess five kilograms or more of cocaine aboard a vessel subject to U.S. jurisdiction with the intent to distribute, 46 U.S.C. app. § 1903(a)(c)(1)(C), (f), (j), and of aiding and abetting the conspiracy. Trial commenced on October 24, 2005. Petitioner was convicted of count two, aiding and abetting, and was sentenced to 121 months' imprisonment. The First Circuit considered Petitioner's appeal and affirmed our judgment on November 21, 2007, in a consolidated opinion, United States v. Rodríguez-Durán, 507 F.3d 749 (1st Cir. 2007). Petitioner claims he requested that his appellate counsel, Jorge Gerena-Méndez, file a petition for certiorari within ninety days following the First Circuit's entry of judgment. (Docket No. 5.) He further alleges that Gerena-Méndez did not comply with this request. (Id.) It was not until November 2008, as Petitioner alleges, that he first discovered Gerena-Méndez had not filed the petition for certiorari. (Id.) Gerena-Méndez argues that he informed Petitioner via letter (Docket No. 18) of his right to petition for certiorari and offered his services in preparing a petition, but insists that Petitioner never responded to this letter. (Docket No. 17.)

Petitioner filed this motion for relief from sentencing (Docket Nos. 1; 5), to which the Government filed an opposition (Docket No. 11). Petitioner responded and requested an evidentiary hearing and appointment of counsel. (Docket No. 12.) Petitioner then moved to amend his petition. (Docket No. 13.) We accepted the proposed amendment and ordered Gerena-Méndez to respond to Petitioner's allegations that Gerena-Méndez' representation had violated the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A. (Docket No. 16.)

II.

Standard for Relief Under 28 U.S.C. § 2255

A federal district court has jurisdiction to entertain a § 2255 petition when the petitioner is in custody under the sentence of a federal court. See 28 U.S.C. § 2255. A federal prisoner may challenge his sentence on the ground that, inter alia, it "was imposed in violation of the Constitution or laws of the United States." Id. The petitioner is entitled to an evidentiary hearing unless the "allegations, even if true, do not entitle him to relief, or . . . 'state conclusions instead of facts, contradict the record, or are inherently incredible.'" Owens v. United States, 483 F.3d 48, 57 (1st Cir. 2007) (quoting United States v. McGill, 11 F.3d 223, 225–26 (1st Cir. 1993)); see 28 U.S.C. § 2255(b). A petitioner cannot be granted relief on a claim that has not been raised at trial or direct appeal, unless he can demonstrate both cause and actual prejudice for his procedural default. See United States v. Frady, 456 U.S. 152, 167 (1982).

III.

Analysis

Because Petitioner appears pro se, we construe his pleadings more favorably than we would those drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). Nevertheless, Petitioner's pro-se status does not excuse him from complying with procedural and substantive law. Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997).

Petitioner challenges his sentence on the following grounds: (1) counsel's failure to file a petition for certiorari; (2) submission of evidence obtained in violation of the Fourth Amendment and a companion Sixth Amendment claim of ineffective assistance of counsel; (3) the Government's failure to obtain a magistrate's review of probable cause for arrest within

forty-eight hours of arrest; (4) counsel's failure to seek dismissal based on violation of the speedy trial act; (5) failure to prove a nexus between the United States and drug smuggling by Petitioner, resulting in a lack of jurisdiction; (6) error in our denial of pretrial motion for continuance; (7) insufficient evidence presented at trial in violation of due process; and (8) failure to issue a limiting instruction regarding a codefendant's confession and a companion claim of ineffective assistance of counsel.

A. Failure to File Petition for Certiorari

Petitioner claims that Gerena-Méndez' representation violated the CJA when he failed to honor Petitioner's request to apply for writ of certiorari.[1] Petitioner relies on Wilkins v. United States, 441 U.S. 468 (1979), for the proposition that appellate counsel's failure to file a petition for certiorari, in violation of the circuit court's rules implementing the CJA, is an error remediable on motion under 28 U.S.C. § 2255 before a district court.

In Wilkins, an inmate sought certiorari after his court-appointed appellate counsel refused the inmate's written request to file a petition for certiorari, in violation of the Third Circuit's rules implementing the CJA. 441 U.S. 468. In arguing the case, the Solicitor General conceded that the CJA conferred a right to assistance of counsel in filing petitions for writ of certiorari for federal convicts. Id. Then, as now, each circuit's local rules guaranteed assistance of counsel for the filing of a petition for certiorari. The Court vacated Wilkins' sentence and remanded to the court of appeals for reentry of judgment, thus resetting the clock for Wilkins' window for petition for certiorari.

[1] Originally, Petitioner styled this claim as a violation of his Sixth Amendment right to effective assistance of counsel. (Docket No. 1.) We granted his request (Docket No. 13) to amend the motion to abandon the Sixth Amendment claim in favor of a claim of violation of the CJA. (Docket No. 16.)

Wilkins, however, did not address relief under § 2255, and we have found no decisions supporting the proposition that a district court may vacate a mandate and order the court of appeals to reenter its judgment. It is well-settled that courts of appeals may recall their own mandates. See Calderon v. Thompson, 523 U.S. 538, 550 (1998) (holding that circuit courts have the ability to recall their own mandates in "extraordinary circumstances); United States v. Fraser, 407 F.3d 9, 10 (1st Cir. 2005) (citing Calderon and further stating that recall of a mandate "should not be used simply as a device for granting late rehearing" (quoting Boston & Me. Corp. v. Town of Hampton, 7 F.3d 281, 282 (1st Cir. 1993))); see also Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 22 n.4 (1st Cir. 2010) (detailing the rare instances in which the First Circuit has granted a motion to recall mandate).

While we have found no decisions by the First Circuit recalling and reentering a mandate as a remedy for counsel's failure to file a petition for certiorari, other circuit courts have addressed the issue. Under its inherent authority to recall a mandate, the Second Circuit recently construed an appeal from denial of a similar § 2255 motion as being a motion for recall of mandate. Nnebe v. United States, 534 F.3d 87 (2d Cir. 2008). Michael Nnebe appealed from a district court's denial of his § 2255 claim that appellate counsel's failure to file a petition for certiorari violated the CJA. The Second Circuit, however, declined to treat this as a § 2255 motion and, instead, construed it as a motion to recall the mandate affirming Nnebe's conviction. Id. at 91 ("[I]t would be illogical to conclude that the application should continue to be treated as though it were a Section 2255 motion."). The Second Circuit granted that motion, vacated its previous mandate, and reentered judgment. Id. The Seventh Circuit also has endorsed the use of a direct petition to the court of appeals to recall a mandate, as opposed

to a motion under § 2255. United States v. Price, 491 F.3d 613 (7th Cir. 2007) (recalling mandate where petitioner's § 2255 motion was stayed to allow him to petition the court of appeals directly for a recall).

In the present case, Petitioner alleges that his appellate counsel did not comply with the First Circuit rule implementing the CJA's appointment-of-counsel provision. See 1st Cir. R. 46.5(c). As discussed above, it appears that the proper remedy for such a violation would be the recall and reentry of the First Circuit's mandate. But we find no authority granting us the power to provide the relief requested. The text of § 2255 requires that petitioners "move the court which imposed the sentence to vacate, set aside or correct the sentence" and allows us to vacate or set aside our judgment while either setting the petitioner free, resentencing him, or ordering a new trial. We are unable to locate any authority that would allow us to recall a circuit court mandate and order its reentry under the guise of § 2255, a statute that explicitly authorizes us to vacate only our own judgments. See United States v. Davis, No. 7:06cr0063-1, 2009 WL 3055230 (W.D. Va. Sept. 23, 2009) (holding that the appropriate relief for counsel's violation of CJA was the recall and reentry of mandate, a remedy outside the district court's authority to grant). Given this lack of statutory authority and also the Second Circuit's treatment of similar § 2255 petitions as motions for a recall of mandate, we hold that Gerena-Méndez' alleged violation of the CJA is not the proper object of a § 2255 proceeding.

B. Unconstitutional Search and Seizure

Petitioner alleges that evidence obtained during the Coast Guard's search of the Sea Atlantic was seized in violation of his Fourth Amendment rights. The sixty-eight bales of

cocaine seized from the Sea Atlantic were discovered in Petitioner's living quarters, in which he asserts a legitimate expectation of privacy.

This claim was not raised on direct appeal and is, therefore, procedurally barred. See United States v. Frady, 456 U.S. 152, 167 (1982). The only cause asserted by Petitioner for the failure to raise this claim on appeal was ineffective assistance of counsel. (Docket No. 5 at 16.) The success of an ineffective-assistance-of-counsel claim depends on Petitioner's showing a deficient performance by his trial counsel. See Peralta v. United States, 597 F.3d 74, 79 (1st Cir. 2010). Performance is deficient where the trial counsel's representation "fell below an objective standard of reasonableness," a standard that is informed by "prevailing professional norms." Id. (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Choices made by counsel that could be considered part of trial strategy will almost never amount to deficient performance. See Strickland, 466 U.S. at 690. Counsel's decision not to pursue "futile tactics" will not be considered deficient performance. Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999); see also Acha v. United States, 910 F.2d 28, 32 (1st Cir. 1990) (stating that failure to raise meritless claims is not ineffective assistance of counsel).

In this case, Gerena-Méndez' performance was not deficient because there was no violation of the Fourth Amendment to which he could object. The First Circuit has repeatedly ruled that "the Fourth Amendment does not apply to activities of the United States against aliens in international waters." United States v. Vilches-Navarrete, 523 F.3d 1, 13 (2008) (quoting United States v. Bravo, 489 F.3d 1, 8 (1st Cir. 2007)). Petitioner is not a U.S. citizen, and the search took place in international waters, off the coast of South America. The Sixth

Amendment does not entitle Petitioner to counsel's lodging such a futile objection. See Vieux, 184 F.3d at 64.

C. Delayed Probable Cause Determination

Petitioner claims his Fourth Amendment rights were violated by the seven-day delay between his arrest and the determination of probable cause by a magistrate. The Supreme Court has held that the Fourth Amendment requires a "prompt" judicial determination of probable cause for warrantless arrests. See Gerstein v. Pugh, 420 U.S. 103, 114 (1975). The Court later ruled that judicial determination of probable cause within forty-eight hours of arrest would normally satisfy the Fourth Amendment. County of Riverside v. McLaughlin, 500 U.S. 44 (1991). A violation of this "48-hour rule," however, is not grounds to vacate a conviction, Gerstein, 420 U.S. at 119, and, therefore, a petitioner cannot seek habeas relief for such a violation, Montoya v. Scott, 65 F.3d 405, 421 (5th Cir. 1995). Thus, Petitioner's 48-hour-rule claim fails.

In addition, Petitioner challenges his pretrial detention through Federal Rule of Criminal Procedure 5(a)(1)(B), which requires defendants arrested outside the United States to be taken before a magistrate judge "without unnecessary delay" and further states that where a defendant "is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed."[2]

We need not address the merits of this claim because Petitioner failed to challenge the alleged delay in probable cause determination at trial or on direct appeal. Whether styled as a

[2] The First Circuit has previously noted that the Fourth Amendment and Rule 5(a) are "analogous" but distinct. See United States v. Encarnacion, 239 F.3d 395, 398 n.2 (1st Cir. 2001) ("[T]he 48-hour rule is a requirement of the Fourth Amendment, not Rule 5(a).").

violation of the Fourth Amendment or of Rule 5(a), the claim fails as procedurally defaulted. Petitioner asserts ineffective assistance of counsel as a cause for this procedural default, but, even assuming a deficient performance by Gerena-Méndez, Petitioner fails to demonstrate any prejudice arising from the delay. See Peralta, 597 F.3d at 79. Prejudice exists where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," and said probability is less onerous than a "more likely than not" standard. Id.

Petitioner has made no argument as to how a potential violation of the Fourth Amendment's 48-hour rule or of Rule 5(a) prejudiced his defense. See, e.g., United States v. Mangual-Santiago, 562 F.3d 411, 432 (1st Cir. 2009) (holding that a 110-day delay between defendant's arrest and arraignment did not necessitate reversal of conviction where defendant had demonstrated no prejudice resulting from delay). The Supreme Court has recently recognized that the only remedy available for Rule 5(a) violations is the use of the McNabb-Mallory rule to suppress confessions obtained during the time a defendant was improperly detained. See Corley v. United States, 129 S. Ct. 1558, 1570 (2009) (discussing the interplay between Rule 5(a) and the McNabb-Mallory line of cases and noting that "if there is no McNabb-Mallory there is no apparent remedy for delay in presentment"). As Petitioner made no such confession, there was no evidence to suppress and, thus, no prejudice from a failure to object to a violation of Rule 5(a). Because Petitioner has not demonstrated cause and prejudice for his failure to raise the issue on trial or appeal, his Rule 5(a) claim is procedurally defaulted.

D. Counsel's Failure to Move for Dismissal on Speedy Trial Act Grounds

Petitioner alleges that Gerena-Méndez provided ineffective assistance of counsel when he failed to move to dismiss the indictment for violation of the Speedy Trial Act, 18 U.S.C. §§ 3161–3174. The Speedy Trial Act states that, absent a defendant's signed waiver, a trial may not begin less than thirty days after a defendant makes his first appearance with counsel or appears pro se after waiving counsel. 18 U.S.C. § 3161(c)(2). Petitioner made his first appearance represented by Gerena-Méndez on September 15, 2005. (Criminal No. 05-309, Docket No. 34.) Trial began on October 24, 2005, over thirty days after Petitioner's first appearance through counsel. (Criminal No. 05-309, Docket No. 114).

Thus, there was no violation of the Speedy Trial Act and, therefore, Petitioner cannot fulfill the first prong of an ineffective assistance claim: Deficient performance.

E. Previously-Litigated Claims

Petitioner also argues that there was insufficient evidence of his guilt presented at trial; that we lacked jurisdiction to hear the case; and that we erred in denying his motion for continuance. Each of these issues was previously raised by him or his codefendants on direct appeal and is, therefore, barred from review under § 2255.

Issues previously raised by Petitioner and rejected on direct appeal may not be litigated again under § 2255. See Murchu v. United States, 926 F.2d 50, 55 (1st Cir. 1991) (quoting Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967)). Similarly, the decision of legal issues by an appellate court establishes the "law of the case" in a subsequent appeal by a codefendant. United States v. Paquette, 201 F.3d 40, 42–43 (1st Cir. 2000) (citing United States v. Rosen, 929 F.2d 839, 842 n.5 (1st Cir. 1991); United States v. Aramony, 166 F.3d 655, 661

(4th Cir. 1999)). This is true "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Rosen, 929 F.2d at 842 n.5 (citing White v. Murtha, 377 F.2d 428, 431–32 (5th Cir. 1967)).

Petitioner has argued that the evidence at trial was insufficient to prove that he possessed the required mens rea—that he "knowingly and intentionally possessed" cocaine with intent to distribute. (Docket No. 5 at 45.) But Petitioner made this same argument before the First Circuit and it was rejected. Rodríguez-Durán, 507 F.3d at 758–61.

In addition, Petitioner argues that the denial of his pretrial motion for continuance was a "manifest abuse of discretion" that prejudiced his defense. Again, Petitioner previously argued this same issue on direct appeal, joined by four codefendants, and his claim was rejected by the First Circuit. Id. at 768. ("In sum, '[w]hile the trial judge held defendants to a tough schedule, in the absence of a showing of unfair prejudice to defendants, there was no manifest abuse of discretion.'" (quoting United States v. Orlando-Figueroa, 229 F.3d 33, 41 (1st Cir. 2000))).

In Petitioner's consolidated direct appeal, codefendant Ronald José Morelis-Escalona argued that his conviction was flawed because the government failed to prove that the vessel was subject to U.S. jurisdiction. Id. at 761–62. The First Circuit found that the flag nation's consent to jurisdiction was sufficient and that the MDLEA does not require as a jurisdictional prerequisite that the defendant's actions have affected the United States. Id. (citing United States v. Bravo, 489 F.3d 1, 7 (1st Cir. 2007); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999)). It also held that the Coast Guard had properly obtained consent from the Bolivian

government to board and search the vessel and that the evidence was sufficient to dismiss Morelis' jurisdictional challenge. Id. at 757 n.9, 762.

Petitioner was a party to Morelis' appeal and his claims are based on the same evidence. See id. at 749. There have been no relevant changes in the law since the appeal, and the decision in Rodríguez-Durán does not seem erroneous or unjust. Therefore, we dismiss Petitioner's jurisdictional claim. See Rosen, 929 F.2d at 842 n.5.

F. Failure to Issue Limiting Instruction

Finally, Petitioner alleges a Sixth Amendment violation stemming from the admission of hearsay testimony of a codefendant's confession and a companion ineffective assistance of counsel claim. (Docket No. 5.) The admission of hearsay testimony describing codefendant Morelis' confession was in violation of the Sixth Amendment Confrontation Clause and, Petitioner alleges, prejudicial to Petitioner's duress defense. (Docket No. 5.) This hearsay claim was not raised by Petitioner at trial or on direct appeal and, therefore, would be procedurally barred. The Government, however, failed to raise this affirmative defense in its reply.[3] See Oakes v. United States, 400 F.3d 92, 96 (1st Cir. 2005) (holding that procedural default is an affirmative defense that is waived if not raised in the Government's reply). We may raise procedural default sua sponte, but in such cases we must provide petitioners with adequate notice and opportunity to respond. Id. at 97–99 (holding that notice is required even where petitioner had anticipated the procedural default defense in his motion). Because

[3] The Government instead relied on the "law of the case" doctrine. (Docket No. 11 at 11–12.) The doctrine, however, is inapposite to this question. In ruling that the lack of a limiting instruction was not plain error and did not prejudice codefendants Rodríguez-Durán and Cabello, the First Circuit relied on facts unique to Rodríguez-Durán and Cabello. See 507 F.3d at 771–72 (describing additional incriminating evidence found in these codefendants' berths that did not implicate Petitioner).

Petitioner has not yet received such notice, we reserve judgment on this issue so that Petitioner might present adequate cause and prejudice that would excuse his procedural default.

No such notice is required for us to deal with Petitioner's companion claim of ineffective assistance of counsel as an independent ground for relief under § 2255. We need not address whether Gerena-Méndez' failure to object to the lack of limiting instruction and raise the issue on appeal were examples of deficient performance because, even if we assume such performance was deficient, Petitioner has failed to demonstrate how that deficient performance prejudiced his defense. As the First Circuit noted in its discussion of this issue, the hearsay testimony of Morelis' confession did not directly incriminate Petitioner. 507 F.3d 771. Morelis simply confessed that he had been paid $40,000 to ship contraband. He did not testify that any other crew member had received such a payment or had advanced notice that they would be transporting cocaine. Therefore, even in light of Morelis' confession, it was possible for the jury to believe captain Rodríguez-Durán's testimony that all crew members were unaware of the drugs until they were on board and, at that point, participated with the smuggling operation out of duress. Even if counsel had objected and succeeded in obtaining a limiting jury instruction, we find, in light of the overwhelming evidence against him, no reasonable probability that the jury would have acquitted Petitioner. In the absence of such a probability, Petitioner cannot demonstrate prejudice and, thus, his claim of ineffective assistance of counsel fails.

IV.

Certificate of Appealability

In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever issuing a denial of § 2255 relief we must concurrently determine whether to issue a certificate of appealability ("COA"). We grant a COA only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). While Petitioner has not yet requested a COA, we see no way in which a reasonable jurist could find our assessment of Petitioner's constitutional claims debatable or wrong. Petitioner may request a COA directly from the First Circuit, pursuant to Rule of Appellate Procedure 22.

V.

Conclusion

For the foregoing reasons, we hereby **DENY in part** Petitioner's § 2255 motion (Docket Nos. 1; 5). We summarily **DISMISS** the claims enumerated as one through seven in Part III, supra, and also the claim of ineffective assistance of counsel arising from failure to give a limiting instruction. Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, summary dismissal is in order because it plainly appears from the record that Petitioner is not entitled to § 2255 relief in this court. We reserve judgment on Petitioner's claim of a Confrontation Clause violation stemming from the failure to issue a limiting instruction. On this ground, we **ORDER** Petitioner to show cause **on or before August 16, 2010**, as to why this

claim should not be dismissed as procedurally defaulted. Pending resolution of this final claim, we reserve judgment on Petitioner's motion for an evidentiary hearing and appointment of counsel (Docket No. 13).

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day of July, 2010.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge